The lower courts are divided and confused over the degree of constitutional protection from common law defamation liability that press reports on government investigations should enjoy. That confusion is compounded by the decision below, which held that the press may be found liable for a report on an ongoing government investigation even where the report is accurate and expressly disavows any implication that the government's target has actually engaged in wrongdoing. The resulting uncertainty about the status of reporting on such government activities chills the ability of the press to report on matters of great public concern. As a result, the public will be deprived of important information about the workings of its government, in direct contravention of key First Amendment principles. *Amici* thus have a strong interest in this case.

INTRODUCTION

Amici agree with Petitioner that this Court should grant a writ of certiorari to clarify that the First Amendment requires courts to consider the reasonably intended meaning of an allegedly defamatory publication taken as a whole before imposing libel-by-implication liability, and that the tort of intentional infliction of emotional distress cannot, consistent with constitutional principles, be applied to the type of reporting at issue in this case. *Amici* submit this brief to point out that a proper resolution of the first question presented – establishing a constitutional limit on the defamatory meaning that can be extracted by implication from an otherwise truthful report on a matter of public interest – would also resolve a significant issue bearing upon press freedom that is causing a troubling degree of confusion among the federal and state courts.

That issue is the extent to which the First Amendment shields truthful reporting on government investigations and other government actions or statements. As shown below,

this is an area in which the importance of a free press for the effective functioning of our democratic system is at its apex and where, because of the sensitive nature of the matters reported on, there is an urgent need both for greater clarity and for adequate protection against defamation claims based on accurate reporting. This Court should grant review and recognize a constitutional rule that a defamation claim cannot be based on an alleged implicit defamatory meaning when the news report or commentary merely describes accurately the actions taken or statements made by the government.

SUMMARY OF ARGUMENT

As this case illustrates, the press is vulnerable to potentially crippling – and speech-chilling – liability and litigation for publishing reports on government investigations or charges under the common law republication and libel-by-implication doctrines. These doctrines threaten the press with liability for publishing accounts of government investigations, even where the report is accurate and the actions of the government are of high public importance. Reporting on government investigations – including where, as here, the reporting is critical of the government's performance – is essential to informing the public fully about the actions of its government. Indeed, the role of the press is most important where the government's actions are misdirected or abusive. Yet a reporter's awareness in such cases that government charges are suspect could assist the plaintiff in establishing "actual malice" in a defamation suit based on the reporting. In these circumstances, the key limits on defamation liability recognized by this Court – truthful reporting and the "actual malice" standard – offer no real protection.

Amici submit that the First Amendment's protections for press reporting on matters of public concern require a rule limiting the media's liability for accurate accounts of

government investigations or charges, at least in situations where the common law would not provide a fair report privilege. Recognizing the need to protect this important contribution to public discourse, many courts have rejected defamation claims against news outlets for publishing these types of reports. In reaching this result, however, courts have relied on a patchwork of disparate and often inconsistent rationales, some based on the First Amendment, others on the common law. Other courts have denied protection altogether. The Court of Appeals' decision adds to this confusion, and would force media entities to validate not only the accuracy of their reports on the government action itself, but also the truth of the underlying government accusation. As a result of this judicial confusion, *Amici* are frequently uncertain as to whether reporting of this type will subject them to protracted litigation and potential liability. This uncertainty threatens to stifle reporting on matters of vital public interest even where, as here, the reports expressly decline to accuse a citizen and instead criticize the government's investigation.

The Court should grant the writ to resolve this confusion and to establish a uniform rule that protects such reporting by limiting defamation claims based on alleged implications arising from truthful reports on matters of clear public interest. This Court has explained that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 12 (1970) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). Because "the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such

liability." *Id.* A rule limiting media liability for accurate reporting on government actions is consistent with this Court's previous decisions establishing constitutional limits on the reach of common law defamation liability, as well as with its recognition of the important First Amendment role of the press.

ARGUMENT

I. COURTS ARE DIVIDED OVER THE LEVEL OF PROTECTION AFFORDED REPORTING ON GOVERNMENT INVESTIGATIONS.

At present, the law is unsettled regarding whether, and to what extent, accurate news reports of government investigations or similar government actions are entitled to protection against common law defamation liability. Many courts properly decline to hold the press liable for such reports, relying on a panoply of rationales and crafting a broad range of legal protections for such reports. Other courts have refused to recognize any protection, either based on the Constitution or existing at common law, for accurate reporting on "unofficial" government proceedings. The decision below highlights both the serious threat to press freedom in this area and the need for clear limits on liability so as to ensure the continued free flow of information on matters of public importance.

A. Inconsistent Interpretations of the Common Law Leave the Press Vulnerable to Lawsuits Based on Accurate Reporting of Government Activities.

As this case demonstrates, the press faces significant legal exposure under common law theories of defamation when it reports on government investigations – even if the reports accurately describe the investigations, and even if the government's actions implicate matters of profound public interest. Central to the problem is the common law

republication doctrine, which imposes liability on a speaker for republishing a defamatory statement originally made by another. *See, e.g., Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 190 (3d Cir. 1998); *Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980); *Restatement (Second) of Torts* § 578 (1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."). As the Fourth Circuit has recognized, "[l]iteral adherence to [the republication] rule would sap the vigor of public debate, and could frighten the press from even reporting to the public the few debates that might occur." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1097 (4th Cir. 1993). This is not a speculative concern; defamation litigants have used the republication doctrine to argue that media defendants are liable for the ultimate truth of defamatory allegations made by government officials, even where the fact that the government officials are making such allegations is itself newsworthy. *See, e.g., Global Relief Foundation, Inc. v. New York Times Co.*, 390 F.3d 973, 980-81 (7th Cir. 2004); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 369-70 (S.D.N.Y. 1998); *Jackson v. Paramount Pictures Corp.*, 68 Cal. Rptr. 2d 1, 12 (Cal. Ct. App. 1998); *Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987); *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

Further compounding the press's exposure is the theory of liability advocated by Respondent here, that of "libel by implication." Libel by implication imposes liability on a publisher when a publication could trigger a defamatory implication or innuendo. *See, e.g., Black's Law Dictionary* 934 (8th ed. 2004) (defining libel by implication as "[l]ibel that creates a false implication or impression even though each statement in the article, taken separately, is true.").

These two common law principles, taken together, mean that accurate reporting on the government's investigation of a crime, which often includes the names or descriptions of persons being investigated, may be read to convey a defamatory implication of wrongdoing, and thus expose the publisher to expensive litigation and potential damages. And at least according to the court below, the press may be held liable even when its reports expressly *disavow* the allegedly defamatory implication.

The common law itself privileges "fair reports" of government proceedings, in recognition of the public value of such reports. *See generally Restatement (Second) of Torts* § 611. But that privilege is applied inconsistently and often so restrictively that reports on "unofficial" or informal government actions, or on nonpublic statements by government officials, are left unprotected. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000) ("[T]he patchwork nature of the law of defamation and confusion across jurisdictions makes articulating a clear statement concerning a majority or minority position on section 611 [of the *Restatement of Torts*] difficult."); *see also* W. Page Keeton, *Prosser and Keeton on Torts* § 111, at 772 (1984).

Some courts have held that the fair report privilege extends to confidential or secret government proceedings, or to preliminary or informal reports preceding formal government action. *E.g.*, *Chapin*, 993 F.2d at 1097 (concluding that fair report privilege covered republication of potentially derogatory remark made by congressman even though it was not made in a formal and public setting); *Crane v. Ariz. Republic*, 972 F.2d 1511, 1519 (9th Cir. 1992) (applying privilege to secret congressional committee investigation); *Reeves v. Am. Broad. Cos., Inc.*, 719 F.2d 602, 606 (2d Cir. 1983) (holding that, under California law,

the fair report privilege "extends to any statement, whether or not true, made in the course of a secret judicial proceeding, since public policy requires witnesses to feel unconstrained to give testimony before investigative bodies without fear of later liability for defamation."); *Medico v. Time, Inc.* 643 F.2d 134, 137-46 (3d Cir. 1981) (holding that fair report privilege under Pennsylvania law covered preliminary FBI reports not generally available to the public); *see also Dorsey v. Nat'l Enquirer*, 973 F.2d 1431, 1434-35 (9th Cir. 1992) (fair report privilege covers reports of non-public family court proceedings).

These rulings recognize the core First Amendment value that underlies the common law fair report privilege – the principle that the public is entitled to know about the workings of its government and that the press serves as a critical conduit for that information. *See Restatement (Second) of Torts* § 611 cmt. a ("The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings."); 2 Rodney Smolla, *Law of Defamation* § 8:67 (2d ed. 2004) ("The fair report privilege is thus a common law doctrine that partakes of values at the very core of first amendment jurisprudence, the political enlightenment function of the first amendment."). Courts often cite this rationale as grounds for recognizing some formulation of the fair report privilege. *See, e.g., Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 713 (4th Cir. 1991) (en banc); *Medico*, 643 F.2d at 141-43; *Moreno*, 610 N.W. 2d at 332-33; *Hayes v. Newspapers of N.H., Inc.*, 685 A.2d 1237, 1238-39 (N.H. 1996).[3]

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[3] Further, in many of its formulations, the fair report privilege holds that a publisher's liability for reports about government proceedings turns on the accuracy of the description of the proceeding – not the truth or falsity of the underlying statements or assertions being reported. *See, e.g.,*

Many other courts, however, hew to the limitations established by the *Restatement*, which provides that "[t]he publication of defamatory matter concerning another in a report of an *official* action or proceeding or of a meeting *open to the public* that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Restatement (Second) of Torts* § 611 (emphasis added); *see, e.g., Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1086 n.26 (3d Cir. 1988); *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992, 1007-08 (D. Minn. 1998); *Stone v. Banner Publ'g Corp.*, 677 F. Supp. 242, 246 (D. Vt. 1988); *Jones v. Taibbi*, 512 N.E.2d at 267; *Wynn v. Smith*, 16 P.3d 424, 430 (Nev. 2001); *Wright v. Grove Sun Newspaper Co.*, 873 P.2d 983, 987-89 (Okla. 1994). Still other courts believe the *Restatement* formulation is too broad. *See, e.g., WKRG-TV, Inc. v. Wiley*, 495 So. 2d 617, 618-19 (Ala. 1986) (rejecting *Restatement* formulation and concluding that Alabama's fair report privilege "is much more limited, and would correspond at most to the 'official action or proceeding' portion of the rule."); *Sciandra v. Lynett*, 187 A.2d 586, 589 (Pa. 1963) (accepting § 611, but retaining Pennsylvania's own common law interpretation of the privilege's limitations).[4]

Medico, 643 F.2d at 138 ("The privilege thus permits a newspaper or other press defendant to relieve itself of liability without establishing the truth of the substance of the statement reported."); *Hurst v. Capital Cities Media, Inc.*, 754 N.E.2d 429, 434-35 (Ill. App. Ct. 2001).

[4] In another wrinkle to the judicial debate over the fair report privilege, some courts hold that the privilege can be defeated by a showing of ill will or in situations in which the reporter suspects that the government's accusations are false. *See* 1 Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* § 7.3.2.2.1 (3d ed. 2005); *see, e.g., Doe v. Doe*, 941 F.2d 280, 289 (5th Cir.), *modified on reh'g*, 949 F.2d 736 (5th Cir. 1991); *Schiavone Const. Co. v. Time, Inc.*, 735 F.2d 94, 97 (3d Cir. 1984); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 78 (W. Va. 1984).

The result is insufficient protection for highly important speech. Government investigations may be at their most newsworthy prior to their culmination in an officially promulgated accusation against a particular individual, and the press should be permitted to report accurately on such investigations without fear of liability or burdensome litigation. *See Chapin*, 993 F.2d at 1097 ("[F]rom the public's viewpoint, a higher proportion of the 'unofficial' public statements of congressmen will be newsworthy and of concern than will the countless 'official' documents generated by quasi-public agencies."). A press that can reprint only formal government statements would fail to play its important constitutional role of "keeping officials elected by the people responsible to all the people whom they were selected to serve," *Mills v. Alabama*, 384 U.S. at 219. This point is exemplified by the facts of this case, which involve a series of newspaper columns critical of the government's lackadaisical handling of an extremely important investigation. Similar examples abound, including in recent years the Wen Ho Lee affair and the Atlanta Olympics bombing investigation. A free press cannot be effectively barred from telling the public about such matters of clear public import, just because of the possibility that an investigation may have focused on the wrong person.

B. Some Courts Protect the Press from Liability for Accurate Reports on Government Actions and Other Matters of Public Interest, But the Holdings Are Inconsistent and Unevenly Applied.

Recognizing the important First Amendment interests at stake, courts have constructed a patchwork of constitutional doctrines to protect reporting on government proceedings that are not considered "official." But, here again, for every decision applying one of those protective rules, there is another that rejects such defenses and leaves the news media

exposed to potential liability for accurate reports on investigations or other government activities that might lead some to conclude that the plaintiff is guilty of wrongdoing.

One approach – a corollary to the constitutional rule advocated here – limits the "capable of defamatory meaning" test by holding that the media are not liable for accurate reports of government investigations. For example, in *Foley v. Lowell Sun Publishing Co.*, the Massachusetts Supreme Judicial Court held that a newspaper report on the plaintiff's arrest for assault was not susceptible of a defamatory meaning because "a reasonable reader could not conclude that the Sun was accusing Foley of assaulting the officer." 533 N.E.2d 196, 197 (Mass. 1989). The court explained: "When the statement is read in the context of the article as a whole, its clear meaning is to report that Foley was arrested for assaulting an officer – and not that he either had been convicted of the offense or had actually committed the assault." *Id.*; *see also White v. Fraternal Order of Police*, 909 F.2d 512, 525-26 (D.C. Cir. 1990); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1439-40 (8th Cir. 1989); *cf. Forsher v. Bugliosi*, 608 P.2d 716, 722-23 (Cal. 1980) (statements in book *Helter-Skelter* not reasonably capable of being read as implicating plaintiff in murder). In holding that accurate reports of government allegations of wrongdoing are not reasonably capable of being read as endorsements of such allegations, these courts implicitly or explicitly recognize that allowing reports to be characterized as defamatory would stifle reporting about matters of vital public interest.

A related group of decisions reaches much the same result. They limit the reach of the republication and libel-by-implication rules by assessing the "substantial truth" of news accounts of government investigations, focusing on the reports' accuracy in describing the government action – *not* the truth of the underlying allegations. In *Global Relief*

Foundation, Inc. v. New York Times Co., for example, the Seventh Circuit found media reports that the plaintiff was a target of a federal investigation into the sources of funding for terrorism to be substantially true and therefore not actionable. 390 F.3d 973 (7th Cir. 2004). In so holding, the court rejected the plaintiff's argument that the "media defendants must be able to prove the truth of the government's charges before reporting on the investigation itself." *Id.* at 987; *see also Green v. CBS, Inc.*, 286 F.3d 281, 284 (5th Cir. 2002) ("In cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported."); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985); *Jewell*, 23 F. Supp. 2d at 367-69 (finding no viable libel claim arising from an accurate report that plaintiff was a "prime suspect" in the Olympic bombing, even though no charges were ever filed); *Basilius v. Honolulu Publ'g Co.*, 711 F. Supp. 548, 550-51 (D. Haw. 1989) (finding no libel claim based on accurate report that plaintiff was accused in an anonymous letter of playing a role in an assassination), *aff'd*, 888 F.2d 1394 (9th Cir. 1989) (unpublished table decision); *McIlvain*, 794 S.W.2d at 16 (report on city investigation substantially true where the defendant's "broadcast statements are factually consistent with [the public agency's] investigation and its findings"); *Jackson*, 68 Cal. Rptr. 2d at 11-12.

This line of cases recognizes, implicitly or explicitly, that limiting the scope of the republication rule in this manner is critical to providing the press with sufficient "breathing room" to report on matters of public interest. "Otherwise, the media would be subject to potential liability every time it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might

later prove the allegations untrue, thereby subjecting the media to suit for defamation." *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex. Ct. App.–Hous. (14th Dist.) 1997). Other courts, however – including the Court of Appeals in this case – have held that media defendants reporting on government inquiries are responsible for the truth of the underlying charge. *See, e.g., Jones v. Taibbi*, 512 N.E.2d at 265-66 (concluding, in suit over broadcast report of allegations made by a private third party, that "the defendants cannot escape liability merely by attributing defamatory statements or actions to a third party. It is the truth of the underlying defamation that must be shown in order to establish the defense of truth."); *Action Repair, Inc. v. Am. Broad. Cos.*, 776 F.2d 143, 149 (7th Cir. 1985); *Martin v. Wilson Publ'g Co.*, 497 A.2d 322, 329-30 (R.I. 1985).

Under yet another approach, some courts treat media accounts of criminal investigations or other controversial issues as non-actionable opinion. *See, e.g. Levin v. McPhee*, 119 F.3d 189, 196-97 (2d Cir. 1997) (finding that defendant used a number of clear signals to indicate to the reader that the version of the events presented was nothing more than conjecture and speculation); *see also Brown v. Hearst Corp.*, 862 F. Supp. 622, 629 (D. Mass. 1994) (implication in news report that defendant was responsible for wife's murder treated as non-actionable "opinion based on conjecture and speculation"), *aff'd*, 54 F.3d 21 (1st Cir. 1995); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986) (en banc); 1 *Sack on Defamation* § 2.4.19 (stating that many courts "view communications that in other circumstances might be considered defamatory statements of fact as protected statements of opinion, given the public-issue context in which they arise"). Again, however, this approach is inconsistently applied and has been explicitly repudiated by some courts. *See, e.g. Condit v. Dunne*, 317 F. Supp. 2d

344, 361-70 (S.D.N.Y. 2004); *Catalano v. Pechous*, 419 N.E.2d 350, 356-57 (Ill. 1980).

Finally, some courts have recognized a constitutionally based "neutral report" privilege, which protects reporting on serious, newsworthy charges made by public figures. *See, e.g., Edwards v. National Audubon Soc., Inc.*, 556 F.2d 113 (2d Cir. 1977). As the Second Circuit has explained, "[w]hat is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation." *Id.* at 120. The neutral report privilege is generally understood to protect a publisher who (1) neutrally and accurately reports, (2) charges made by a responsible and prominent speaker, (3) concerning public figures, (4) where the accusations are themselves newsworthy. *See, e.g., Price*, 881 F.2d at 1434; *Edwards*, 556 F.2d at 120.

Like the fair report privilege, the neutral report privilege has been applied inconsistently. Not every jurisdiction that has adopted the neutral report privilege has required the allegations to come from a reputable source. In *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984), for example, the court extended the privilege to a case in which the source of the statement was a convicted felon. Neither is there consistency as to whether the privilege extends to cases involving both public- and private-figure plaintiffs. *Compare April v. Reflector-Herald, Inc.*, 546 N.E.2d 466, 469 (Ohio Ct. App. 1988) (finding "no legitimate difference" between private and public plaintiffs for purposes of applying the privilege), *with Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (limiting the privilege to cases involving public figures and rejecting its application to cases

involving private-figure plaintiffs, regardless of newsworthiness). The neutral report privilege has also been rejected in its entirety by several courts. *See, e.g.*, *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1226 (3d Cir. 1978); *Tunney v. Am. Broad. Co.*, 441 N.E.2d 86, 92 (Ill. App. Ct. 1982); *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 517-18 (Mich. Ct. App. 1982); *Norton v. Glenn*, 860 A.2d 48, 58-59 (Pa. 2004), *cert. denied*, 125 S. Ct. 1700 (2005).

As with the other theories discussed above, the neutral report privilege reflects judicial recognition of the need to protect news reports about important matters to ensure an informed populace. Nevertheless, it is unevenly applied and, in its most common formulation, may not apply to reports that do not concern "official" government statements.

In sum, when the press attempts to decide whether and how to report about a governmental investigation or accusation of great public importance – such as the anthrax investigation at issue here – it must deal with the twin realities that (1) the law is very unclear and (2) there is a real risk of being held liable for "republishing" the implication that the individual involved is, in fact, a wrongdoer. This Court should take this opportunity to provide both clarity and proper constitutional protection.

II. THE COURT SHOULD GRANT CERTIORARI AND ENFORCE A FIRST AMENDMENT LIMIT ON COMMON LAW DEFAMATION LIABILITY FOR PRESS REPORTS ON GOVERNMENT ACTIONS.

The Court should grant certiorari to bring clarity to this area of unsettled law and to ensure that common law theories of liability are not permitted to stifle important news reporting. A general rule protecting the press from liability for accurate reporting on government investigations and other similar government actions would cohere with and

complement this Court's previous decisions requiring the common law of defamation to yield in certain circumstances to constitutional free speech principles. It also would be consistent with the Court's recognition of the central role played by the press in facilitating self-government.

This Court has repeatedly recognized that in certain instances the First Amendment guarantees of free speech and free press may require limiting the reach of traditional common law defamation and related torts. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court has required these constitutional limitations, despite their attendant burdens on some private litigants, because of "the need to encourage debate on public issues." *Hepps*, 475 U.S. at 777. Without such constitutional protections, the public would be deprived of speech on important matters. *Id.* (observing that the "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result."); *see also Bresler*, 398 U.S. at 11-14. In *New York Times Co. v. Sullivan*, the Court recognized the particularly pernicious effect of potential tort liability on reports criticizing the government, observing that "[w]hether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278.

The Court's decision in *Bresler* recognized the importance of giving the press sufficient leeway to report on

important – though controversial – government matters, in part by rejecting the plaintiff's attempt to hold the defendant liable for the truth of the underlying accusation, rather than the truth of the report that the accusation occurred. In *Bresler*, the Court held that a newspaper was not liable for defamation for its coverage of "several tumultuous city council meetings," during which meetings the plaintiff's position was characterized as "blackmail." 398 U.S. at 7. The plaintiff's theory of liability was that the articles "imputed to him the crime of blackmail." *Id.* at 8. The Court rejected this argument, concluding that no reader would read the reporting as accusing Bresler of the crime of blackmail. *Id.* at 14. According to the Court, "the imposition of liability on such a basis was *constitutionally impermissible* – that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported." *Id.* at 13 (emphasis added); *see also Hustler Magazine*, 485 U.S. at 50 (First Amendment precluded recovery in state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" in literary definition of a union "scab" not a basis for a defamation action since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"). *Bresler* further recognized that "[t]o permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." 398 U.S. at 14.

A general rule protecting accurate reports of government action, whether the action is "official" or not, is necessary to safeguard what this Court has recognized is the critical role of the press in informing the public about the actions of its

government. The constitutional guarantees of free speech and a free press "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'" *Time, Inc. v. Hill*, 385 U.S. at 389 (quoting *New York Times v. Sullivan*, 376 U.S. at 254; alterations in original); *see also Mills*, 384 U.S. at 219 (noting that the "Constitution specifically selected the press" to fulfill an "important role" in our democracy). Reporting on government investigations is critical to the public's ability to evaluate how their elected and appointed officials are executing the responsibility of enforcing the laws and protecting the peace. *See, e.g.*, *Cox Broad.*, 420 U.S. at 492 ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."). As this Court has explained, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

These principles apply with full force to this case and argue strongly for this Court's review. As Judge Wilkinson observed, "[t]he public's right to know in this case was not a matter of voyeurism, titillation, or idle curiosity. The bioterrorism presaged by these anthrax mailings was no small matter, and it may one day pose a threat on a very large scale." Pet. App. 74a (Wilkinson, J., dissenting from denial of rehearing en banc). The approach taken by the panel

majority threatens to chill similarly important reporting in the future: "The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well." *Id.* at 67a. "Doubtlessly, it is painful to be cast before the public as the target of an investigation where later events point to baseless or vexatious charges. The greater wrong, however, would be to shroud in secrecy, for want of publication, the government's scrutiny of its citizens." *Sibley v. Holyoke Transcript-Telegram Publ'g Co.*, 461 N.E.2d 823, 826 (Mass. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, the ABC Radio Network, 72 radio stations and 10 television stations that regularly gather and report news to the public. ABC News produces the television programs *World News Tonight*, *20/20*, *PrimeTime Live*, *Good Morning America*, and *Nightline*, among others.

The American Society of Newspaper Editors (ASNE) is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 750 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The Association of American Publishers, Inc. (AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the

major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Belo Corp. began as a Texas newspaper company in 1842 and today is one of the nation's largest media companies with a diversified group of market-leading newspaper, television, cable, and interactive media assets. Belo's daily newspapers include *The Dallas Morning News* and *The Providence Journal* (the United States' oldest major daily newspaper of general circulation and continuous publication). Belo's nineteen television stations include six stations in the fifteen largest United States broadcast markets. Belo also owns or operates seven cable news channels and owns more than thirty news and information Web sites.

Cable News Network LP, LLLP is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is in turn wholly owned by Time Warner, Inc. CNN is the world's largest news organization with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the world.

Cox Enterprises, Inc., through its Atlanta Newspapers Division and wholly-owned direct subsidiary Cox Newspapers, Inc., publishes *The Atlanta Journal-Constitution* and sixteen other daily and twenty-five non-daily newspapers.

Daily News, L.P. publishes the New York *Daily News*, which is the fifth-largest circulation newspaper in the country, serving primarily the New York City metropolitan area.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's* magazine, and other periodicals, and, through its Ottaway Newspapers, Inc. subsidiary, a number of daily and weekly community newspapers.

The E.W. Scripps Company is a diverse media company with interests in newspaper publishing, broadcast television, and national television networks. The company operates 21 daily newspapers, with a combined paid daily circulation of 1.1 million; 15 broadcast television stations, including six ABC affiliates and three NBC affiliates; and five cable and satellite television programming networks and a television retailing network totaling more than 84 million subscribers.

Fisher Communications, Inc. is an integrated media company that has been in the broadcasting business since 1926. It owns and operates nine network-affiliated television stations and 27 radio stations in the Pacific Northwest, with its headquarters in Seattle, Washington. The Company owns a 50% interest in a company that owns a tenth television station in Oregon. Its largest stations are ABC affiliates in Seattle, Washington and Portland, Oregon.

Forbes Inc. is the publisher of *Forbes*, the nation's leading business magazine, with a North American circulation of 900,000. *Forbes*, *Forbes Asia*, with a circulation of over 80,000, and the company's local language editions together reach a worldwide audience of over 5 million. Forbes.com, the No. 1 business site on the web, publishes more than 1,500 articles throughout the business

day. Other company divisions include ForbesLife, Forbes Custom Media, Forbes Conference Group and American Heritage, publisher of *American Heritage*, *American Legacy*, and *American Heritage of Invention and Technology* magazines.

Freedom Communications, Inc., headquartered in Irvine, California, is a privately-owned diverse media company that primarily publishes metropolitan area and community newspapers and operates television broadcast stations. The company and its affiliates publish 28 daily and 48 weekly newspapers in 11 states, with a combined circulation of just over 1 million. Freedom's flagship newspaper is *The Orange County Register*, published in Santa Ana, California, with daily circulation of approximately 300,000 and Sunday circulation of approximately 358,000. The television broadcast division includes eight stations in seven states, with five CBS and three ABC network affiliates.

Gannett Co., Inc. is an international news and information company that publishes 91 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including *USA TODAY*, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 23.3 million. The company also operates more than 130 websites in the United States and a national news service. Gannett's 21 television stations cover 17.9 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a

publicly traded company that owns and operates numerous television broadcast stations.

Landmark Communications, Inc. is a privately-held media company with national and international interests in newspapers, broadcasting, cable programming, and electronic publishing, including The Weather Channel, *weather.com*, and *The Virginian-Pilot*.

The McGraw-Hill Companies, Inc. is a multimedia publishing and information company that publishes books and magazines, including *BusinessWeek*, and also operates four local television stations.

The National Association of Broadcasters (NAB) is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, and the Courts. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to disseminate freely programming and information of all types.

NBC Universal, Inc. is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment, and information to a global audience. NBC Universal owns and operates the NBC television network, a Spanish-language television network (Telemundo), NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group consisting of 29 owned and operated television stations that produce substantial amounts of local news, sports, and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline," and "Meet the Press."

The Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The New York Press Club, Inc. is an association of more than 700 members currently or formerly in the news media. The organization was established in July 1948 for the main purpose of promoting freedom of the press and secondarily to provide educational services for those entering and already in the field of journalism. The organization is headquartered in New York City and now represents members throughout the New York metropolitan area in both electronic and print media.

The Radio-Television News Directors Association (RTNDA) is a professional association devoted to electronic journalism. RTNDA represents local and network news executives, educators, students, and others in the radio, television, and cable news business worldwide. RTNDA's general nature and purpose is to encourage excellence in the electronic journalism industry and to work to uphold and promote the First Amendment freedoms of the news media.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors. The Reporters Committee's general nature and purpose is to work to defend the First Amendment and freedom of information interests of the news media.

Reuters America LLC is an indirect subsidiary of Reuters Group Plc. Founded in 1851 in London, Reuters serves the global financial markets and news media with a wide range of information products and transactional

solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and benchmarking analytics; plus news in text, video, graphics, and photographs. Some 327,000 financial market professionals working in the equities, fixed income, foreign exchange, money, commodities, and energy markets around the world use Reuters products. Reuters is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 197 bureaus around the world, serving 130 countries, and publishes approximately 30,000 headlines daily, including third party contributions, in 19 languages.

The Society of Professional Journalists is the largest and most broad-based journalism organization in the United States, with a membership consisting of professional working journalists, college and university professors, and student journalists. The Society is committed to encouraging the free practice of journalism, improving the quality of journalism, and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the guarantees of freedom of speech and press found in the First Amendment to the United States Constitution.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 150 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *InStyle*, *Real Simple*, *Money*, and *Entertainment Weekly*. Time Inc. is a subsidiary of Time Warner Inc.

Tribune Company is one of the nation's premier media companies, reaching more than 80 percent of U.S. households. Tribune publishes 11 market-leading

newspapers including the *Chicago Tribune*, *Newsday*, *Los Angeles Times*, and the *Baltimore Sun*; owns and operates 26 television stations; and operates a network of local and national news and information web sites throughout the United States.

U.S. News & World Report, L.P. publishes *U.S. News & World Report* magazine, a weekly national newsmagazine devoted to investigative journalism and to reporting and analysis of national and international affairs, politics, business, health, education, science, technology, and social trends. Through its annual rankings of America's Best Colleges, Best Graduate Schools, and America's Best Hospitals, along with its News You Can Use® brand, *U.S. News* has earned a reputation as the leading provider of service news and information.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 678,000 and a Sunday circulation of over 965,000. The newspaper is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation.